STATE OF MICHIGAN

COURT OF APPEALS

BRUCE A. KLUNZINGER and SHIRLEY A. KLUNZINGER,

Plaintiffs-Appellants/Cross-Appellees,

v

WALTER THOMAS FITZSIMONS and JEAN L. FITZSIMONS,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
October 26, 2004

No. 248481
Antrim Circuit Court
LC No. 02-007859-GC

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition to defendants and dismissing plaintiffs' claim that they acquired defendants' easement across their property by adverse possession. The order also defined the rights defendants enjoy under the easement. Defendants cross appeal from the trial court's denial of their request for attorney fees and costs. We affirm.

Plaintiffs first argue that the trial court erred in finding that they failed to satisfy the elements of adverse possession as to the easement. We disagree.

This Court reviews orders granting summary disposition pursuant to MCR 2.116(C)(10) to determine whether, when the evidence is considered in the light most favorable to the non-moving party, there is a genuine issue of material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmovant receives the benefit of all reasonable inferences. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999). The benefit of the doubt is given to the existence of a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). If the record, when viewed in this way, leaves open an issue on which reasonable minds could differ, summary disposition is inappropriate. *Allstate Ins Co v Dep't of Mgt & Budget*, 259 Mich App 705; 675 NW2d 857 (2003).

An easement is a right to use the land of another for a specific purpose. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). The terms of an easement

are created by the easement agreement. *Great Lakes Gas Transmission Co v MacDonald,* 193 Mich App 571, 575; 485 NW2d 129 (1992).

To establish adverse possession of property, a party must show that it has used another's property in a manner that is open, notorious, adverse, and continuous for a period of fifteen years. *Plymouth Canton Community Crier, Inc v Prose,* 242 Mich App 676, 679; 619 NW2d 725 (2000). Permissive use, by definition, is not adverse. *Id.* Moreover, the use must be "made under a claim of right when no right exists." *Id.* at 681.

The trial court correctly found that plaintiffs could not establish adverse possession because their use of the property was permissive. The record clearly establishes that, to the extent plaintiffs' predecessors in interest intruded their dock onto land on which the easement gave defendants the right to place their own dock, they did so with defendants' permission. Therefore, the possession was not adverse,[1] and so the elements of adverse possession are not met.[2]

Plaintiffs next argue that the trial court, in construing the extent of defendants' rights under the easement partly as plaintiffs had sought and partly as defendants had sought, extended those rights too far. We disagree.

"The extent of a party's right under an easement is a question of fact. Thus, our review of the trial court's determination of the parties' respective rights under the easement is for clear error." *Dobie v Morrison,* 227 Mich App 536, 541; 575 NW2d 817 (1998) (citation omitted).

The trial court ruled that defendants could place a dock within the strip of land ten feet wide over which they have an easement for placement of the dock and for access to it. It ruled, however, that there was no limitation on the length the dock. It further stated that defendants could use the dock for any purpose for which a dock is regularly used, and that they could place boats and boat hoists by the dock, as long as they kept them within the ten-foot zone permitted by the easement. Plaintiffs challenge those rulings regarding the permissible length of the dock,

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[1] Plaintiffs argue that, in order for possession to be "adverse," there need not be hostility between the parties. This may be true, but it does not change the fact that permissive use of property cannot form the basis for adverse possession.

[2] This is by no means the only difficulty with plaintiffs' claim for adverse possession. There are factual disputes as to whether defendants used the easement as intended throughout the period for which adverse possession was claimed. Although the trial court correctly held that its disputed nature precluded summary disposition for defendants on this basis, it would also preclude the summary disposition in their favor which they ask this Court to enter on their behalf. Moreover, there is a serious question as to whether, when the evidence is interpreted in the light most favorable to plaintiffs, possession of the property by plaintiffs or their predecessors in interest can be shown to have extended for the requisite fifteen years. We do not base our ruling on these factors, but note them to make it clear that, although we do not find it necessary to reach these issues, we are aware that arguments could be made for basing this decision on alternate grounds.

and the permissibility of placing a boat hoist by the dock. On the latter point, they argue that a boat hoist could not possibly be kept within the ten-foot easement zone.

The easement document is silent as to the permitted size of a dock. It specifically references the ability to place the dock in existence at that time on the easement land, and details the size of that dock. It also says specifically that defendants have "the right if desired to erect and maintain a new dock leading into Torch Lake." The only restriction pertaining to the dock's size is, "A new dock if erected must be placed inside the southerly ten (10) feet if [sic: of] the premises sold herein." As the original dock was described as "approximately 5 feet wide," presumably, a new dock of twice its width is permitted by this express language. Nothing is said about the replacement dock having to be the same size, and presumably, this could have been stated had it been the parties' intent, particularly given the wide discrepancy between the size of the original dock and the size apparently permitted for a new one. Moreover, nothing at all is said about the dock's length. Although, as stated, the easement document details the size of the dock in use at the time the document was written, it did so only descriptively, without any suggestion that any future replacement dock would have to be the same size.

As for the placement of boats or a boat hoist, the easement document stated that the intent of the easement was to allow defendants to have a dock and to have access to it. Given that docks are used for boats, it is only reasonable to assume that the placement of boats and, if necessary a hoist for them, was envisioned by the document. As for plaintiffs' concern that a hoist could not be contained within the ten-foot easement area, this concern has already been addressed by the trial court's provision that any hoist must be placed entirely within the easement zone.

Defendants raise two issues on cross appeal. First, they assert that plaintiffs did not properly perfect their appeal of the ruling on the adverse possession issue, as it was an interlocutory order, and plaintiffs appealed only the court's final order. This argument lacks merit. An appeal of a final order permits the appellant to seek review as well of interlocutory orders or decrees leading to the final order. *Tomkiw v Sauceda,* 374 Mich 381, 385; 132 NW2d 125 (1965).

Finally, defendants argue that the trial court erred in not awarding them sanctions under MCR 2.114, contending that this lawsuit was frivolous and was filed for the improper purpose of gaining leverage to force them to forego a legal right. The trial court specifically found that this was not a frivolous lawsuit, noting that it had been well briefed and well argued by both sides. It also noted that neither side had prevailed in full. This Court reviews a trial court's ruling on whether a claim is frivolous, and thus subject to sanctions, for clear error. *Kitchen v Kitchen,* 465 Mich 654, 661; 641 NW2d 245 (2002). We find no clear error in the trial court's ruling.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey